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In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
A DELAWARE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. DEFENDANT ABSURDLY CONCLUDES THAT THE PLAINTIFFS' CAUSE OF ACTION AROSE UNDER THE VERY STATUTE THAT THIS COURT HELD IN *PATTERSON* DOES *NOT* GIVE RISE TO THAT ACTION

In its brief on the merits in this Court, Defendant abandons both its earlier position and the Seventh Circuit's holding below, that Plaintiffs' claims "'arise under' the original section 1981 *as well as the 1991 Civil Rights Act,*" [1] and *now* takes the astonishing position that Plaintiffs' claims arise *only* under the original Section 1981 enacted in 1866. According to Defendant, Plaintiffs' claims "arise under the operative language of a statute enacted more than a century ago, with a settled limitations rule established by this Court in 1987- [2] not under the amendment of the definition of the

[1] Appellant's Reply Brief at 5, *Jones v. R.R. Donnelley*, 305 F.3d 717 (7th Cir. 2002). (1/4/02) (emphasis added). See also the Seventh Circuit's holding at J.A. 92, that the language of Section 1658(a) does not address a cause of action that falls under two acts "one enacted before and one enacted after the effective date of §1658." To the extent that this Court reaches the issue and believes that Plaintiffs' claims arise under both statutes, Section 1658(a) still applies to the claims at issue. (See U.S. Br. 17)

[2] Although this Court held in *Goodman* v. *Lukens Steel Co.*, 481 U.S. 656 (1987) that the State's personal injury statute would govern the limitations period under §1981 claims, it is inaccurate to describe the limitations issue as having been "settled" since 1987. That ruling, four years prior to the 1991 Civil Rights Act, has continued to spawn litigation in the States regarding the proper statute to be used. For example see, *Woodson v. International Broth. of Elec. Workers Local 292*, 974 F.Supp. 1256 (D.Minn. 1997); *Carney v. American University*, 151 F.3d 1090 (D.C. Cir. 1998).

'make and enforce' element of a Section 1981 claim." (Resp. Br. 9, 12-13, 36) That new argument is not only absurd but would require this Court to overrule both *Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77 (1989) and *Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994).

In *Patterson,* this Court held that the words "to make" contracts limited Section 1981 to discrimination only in the formation of a contract. This Court further held, not that Section 1981 should be narrowed despite its original intent, but that the 1866 statute was never meant to reach certain types of actions. According to this Court, Section 1981, as enacted in 1866, "protected just two rights: the right to make contracts, which 'extend[ed] only to the formation of a contract but not to problems that may later arise from the conditions of continuing employment,' and the right to enforce contracts, which 'embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.'" 491 U.S. at 176-77. The *Patterson* Court did not merely hold that the plaintiff failed to prove one element of the claim or that the burdens were misapplied, it held that Section 1981 as a substantive right did not cover post-contract formation. After *Patterson*, there was no cause of action under Section 1981 for post-contract claims of discrimination in the terms and conditions of employment, which are precisely what the Plaintiffs claim here.

Compelled by the *Patterson* decision, this Court recognized in *Rivers* that Section 1981(b) created entirely *new legal obligations*. 511 U.S. at 304. Specifically, this Court held that the 1991 Act "enlarged the category of conduct that is subject to 1981 liability." *Id.* at 303. As this Court stated in *Rivers,* the interpretation of Section 1981 in *Patterson* is "an authoritative statement of what Section 1981 always

meant. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.... (footnote omitted)...Thus, *Patterson* provides the authoritative interpretation of the phrase 'make and enforce contracts' in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991." *Id* at 312-13.

Despite this Court's clear holding in *Rivers* that the 1991 Act and claims, like the Plaintiffs' herein, that are dependent on that Act create "entirely new legal obligations," (511 U.S. at 304) Defendant incredibly asserts that Plaintiffs' cause of action for employment discrimination "springs up" from the 1866 statute and that therefore claims under Section 1981(b) should rely on the past practice of borrowing state statutes of limitations. This conclusion is absurd. Plaintiffs' claims could not "originate in," or "spring up" from the original version of Section 1981 enacted in 1866, because this Court unambiguously so held in *Patterson*. Rather, the claims at issue in this case did not originate or spring up until 1991, when Congress passed the 1991 Civil Rights Act, an Act that, for the first time, made Plaintiffs' claims actionable under Section 1981.[3]

II. IT IS UNDISPUTED THAT PLAINTIFFS' CAUSE OF ACTION DID NOT EXIST UNTIL THE ENACTMENT OF THE 1991 CIVIL RIGHTS ACT

Defendant does not challenge the fact that Plaintiffs' cause of action for employment discrimination was "not actionable"

[3] Defendant's position that Section 1981(b) claims should rely on the past practice of borrowing state statutes of limitations is equally absurd in that it is the problems with this "borrowing" practice that led Congress to enact Section 1658(a) in the first place. (See U.S. Br. 22-24.)

(*Patterson*, 491 U.S. at 171) until the enactment of the 1991 Civil Rights Act, and in fact admits that it is "clear" in this case that Congress expanded Section 1981's scope to allow for Plaintiffs' cause of action. (Resp. Br. 2) Indeed, the Defendant has no choice here. In *Rivers*, this Court expressly held that the 1991 Civil Rights Act "create[d] liabilities that had no legal substance before the [1991] Act was passed". 511 U.S.at 313. Despite Defendant's admission that Plaintiffs had no cause of action under Section 1981 until the 1991 Act, Defendant contends that Plaintiffs' cause of action does not "arise under" the 1991 Act. Defendant reaches this conclusion by mischaracterizing both Plaintiffs' and the Government's position regarding the settled meaning of the phrase "arising under" and inventing its own unique definition. (Resp. Br. 35)

Defendant inaccurately asserts that both Plaintiffs and the Government base their interpretation of "arising under" under Article III's "federal ingredient test". (See, Resp. Br. 1, 9, 10, 19) However, both Plaintiffs and the Government clearly argue that Plaintiffs' cause of action arises under federal law and that the body of law defining "arising under" as used in the statutory jurisdiction context is the most natural rule to follow. As Plaintiffs argued in their brief, "Perhaps the most important of the statutes using the phrase 'arising under' is 28 U.S.C. 1331 which confers on federal district courts original jurisdiction over 'all civil actions arising under the constitution, laws, or treaties of the United States'"... "Plaintiffs' complaint relies on the 1991 Civil Rights Act and Section 1981(b) is an essential element of Plaintiffs' cause of action." (Pet. Br. at 12-13).

The Government's brief also articulates why the Court should interpret Section 1658(a)'s reference to "arising under" as incorporating the body of law developed under

Section 1331. (U.S. Br. 13 n.4) "[T]he natural conclusion is that Congress intended Section 1658(a)'s use of 'arising under' to have a similar meaning as Congress's use of that term in the well-known statutory jurisdiction provisions of the same title of the Code." (U.S. Br. 12) "Arising under" is an inclusive term as used both in Article III and in Title 28. But the statutory definition of "arising under" is, as this Court has recognized, narrower than the Article III definition of that term. See, *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1, 8-9 n.8 (1983); *Verlinden B.V. v. Central Bank of Virginia*, 461 U.S. 480, 494-495 (1983). The logical conclusion is that Congress adopted the statutory definition of arising under that it itself had used in the surrounding provisions of the United States Code.

Indeed, this Court has specifically recognized that Congress's use of the phrase "arising under" is "'strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U.S.C. § 1331.'" *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 833 (2002) (quoting *Coastal States Mkt'g, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 183 (2d Cir. 1979)); See *Christianson v. Colt Indus. Operating Co.*, 486 U.S. 800, 808-809 (1988) ("[l]inguistic consistency" between Congress's use of the term "arising under" in different statutory provisions "demands" that the Court adopt a similar interpretation of the phrase). That rule of construction applies with particular force, where, as here, Congress invokes the term "arising under" in the same part of the United States Code (Title 28) in which that phrase was famously used by Congress to describe the jurisdiction of the federal courts. (See U.S. Br. 11-12.)

After misstating Plaintiffs' (and the Government's) position, the Defendant erroneously states that Plaintiffs have

added a "'newness' test" to Article III's ingredient test. (Resp. Br. 22-23; see U.S. Br. at 14). Defendant fails to appreciate the distinction between the meaning of "arising under" as used in Article III and the narrower meaning of that term as used in the jurisdictional provisions of Title 28 of the United States Code. Moreover, what Defendant belittles as a "'newness' test" is drawn from what this Court has called "[t]he most familiar definition of the statutory 'arising under' limitation," i.e., "Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'"[4] *Laborers Vacation Trust,* 463 U.S. at 8-9 (quoting *American Well Works Co. v. Laynes & Bowler Co.,* 241 U.S. 257, 260 (1916)) (emphasis added).

As explained in the Government's brief, this Court has built on that statutory definition of "arising under" in subsequent cases. (U.S. Br. 12-13) Thus, as this Court has stated in the context of construing 28 U.S.C. 1331 and 1338, a claim arises under a statute if either "(1) the statute creates the cause of action, or (2) the statute establishes a necessary

[4] Defendant's attempt (Resp. Br. 17) to muddle the definition of "arising under" by pointing to other areas outside of Title 28 of the Code in which Congress has used "arising under" should be rejected. There is no doubt that the most familiar definition of arising under is the one that Congress uses in the statutory jurisdiction context. The most reasonable conclusion is that Congress intended to adopt that meaning when it used the term in Section 1658(a). That conclusion is underscored by the fact that, unlike the Medicare and Social Security Act provisions cited by Defendant, Section 1658(a) is in the same Title of the United States Code as the jurisdictional provisions that use "arising under." (See, U.S. Br. 13 n.4) Defendant's reliance (Resp. Br. 18 & 21 n.9) on *Merrell Dow Pharm., Inc. v. Thompson,* 478 U. S. 804 (1986) is also misplaced. (See U.S. Br. 12 n. 3).

element of the claim, such that the plaintiff's right to relief necessarily depends on the statute." *Holmes Group,* 535 U.S. at 830; see also cases cited at U.S. Br. 12-13. This settled statutory definition of "arising under" is not novel by any stretch and, as discussed, it is the most natural reading of Section 1658(a) that Congress intended the phrase "arising under" in Section 1658(a) of Title 28 to have the same meaning as its use in the nearby provisions of Title 28.[5]

According to Defendant, Section 1658(a) applies "only when" Congress creates an "entirely new claim" that does not depend at all on a preexisting statute. (Resp. Br. 2, 14, 35) Plaintiffs were unable to find even one statute creating a private right of action that would benefit from Congress's enactment of Section 1658(a) if the Defendant's interpretation were to be adopted. Assuming that Congress intended Section 1658(a) to have a meaningful impact on the problem identified by the Federal Courts Study Committee, then it makes perfect

[5] Although Defendant claims (Resp. Br. 15) that it is wrong to "blithely" assume that Congress intended its use of the familiar term "arising under" in Section 1658(a) of Title 28 to have the same meaning of its use of that term in the surrounding jurisdictional provisions of Title 28, it is a settled rule of construction followed by this Court that when Congress borrows a well-known legal phrase it intends to adopt the settled meaning of that term. As Justice Frankfurter put it, when Congress uses a familiar term from "another legal source, whether the common law or other legislation, it brings the old soil with it". *Evans v. United States,* 504 U.S. 255, 260 n.3 (1992) (See U.S. Br. 9). The meaning of Section 1658(a)'s use of "arising under" is not, as Defendant suggests, "wholly distinct" (Resp. Br. 15) from its meaning in the jurisdictional provisions in Title 28. Rather, given its inclusive nature and well- settled meaning, it made perfect sense for Congress to borrow that term in establishing the causes of action subject to Section 1658(a).

sense that it would invoke an inclusive and well-settled phrase like "arising under" to describe the statute's reach and that reach would include all causes of action arising under all Acts of Congress enacted after December 1, 1990 regardless of whether or not the Act had "roots in" or "referenced" previous laws.

III. DESPITE DEFENDANT'S REPEATED ASSERTIONS THAT PLAINTIFFS' INTERPRETATION OF SECTION 1658(a) IS UNWORKABLE, DEFENDANT ITSELF ACKNOWLEDGES THAT THE APPLICATION OF SECTION 1658(a) IS "RELATIVELY EASY" IN THIS CASE

Throughout Defendant's brief, Defendant admits that *in Plaintiffs'* case the application of Section 1658(a) is straightforward, but it nevertheless asks this Court to rule against Plaintiffs because in the abstract hypotheticals offered by Defendant that same clarity *might* not exist. See Resp. Br. 2, It "*is clear*" that Congress *expanded* the scope of Section 1981, but "that clarity will not usually exist"; *Id.* at 11, "That determination *was relatively easy here* where Congress had expressly overruled a decision of this Court. But such clarity will rarely exist."; *Id.* at 26, "In this case, the nature of the 'new' claim is clear. *It is recognized that liability under Section 1981 was expanded*, because this Court had spoken on the scope of Section 1981 and Congress reversed the Court's interpretation in the Civil Rights Act of 1991. In many cases, however, that clarity will be lacking." However, what Defendant fails to appreciate is that it is Plaintiffs' "clear" case that is before this Court, not some lawyer-created hypothetical. Defendant's admissions that Plaintiffs case is "clear" and "easy" should be the basis for this Court's ruling, not Defendant's scare tactic hypotheticals.

Notwithstanding its admission, Defendant nevertheless claims that Plaintiffs' interpretation contravenes legislative intent by eliminating established limitations rules for claims arising under "many venerable statutory regimes." (Resp. Br. 11) Defendant, however, fails to point to *even one* such statutory regime. Defendant desperately argues that although it concedes that Plaintiffs' interpretation does not generate confusion in Plaintiffs' case, it would generate confusion and litigation under "numerous statutes whose limitations rules were thought to be settled." (Resp. Br. n. 5) In support of that theory, Defendant cites the statutes Plaintiffs cited at Pet. Br. 26-27. However, not one of those statutes cited had "well settled limitations rules". Defendant's hypotheticals are just that and Defendant has no *real* examples to espouse because there are no examples to support their feigned confusion. [6]

[6] Defendant's various arguments regarding the possibility of multiple statutes of limitations under Section 1981 are also misplaced. (Resp. Br. 24-25) In Plaintiffs' case none of the causes of action existed prior to the Civil Rights Act of 1991 and therefore the four-year statute should be the statute for the entire case. Even if this Court were to rule that the four-year statute would only apply to claims like Plaintiffs' (that were not viable until the 1991 Civil Rights Act) it would still not cause the confusion that Defendant suggests, because it is not uncommon to have several different statutes of limitations govern different claims in an action, even though the claims challenge the same alleged misconduct. For example, many plaintiffs that bring Section 1981 claims also bring Title VII claims and Title VII has its own specialized timing rules. (See U.S. Br. 27) In addition, lawyers filing actions under Section 1981 after *Rivers* had to be aware of the issues surrounding the 1991 Act because they would have to determine whether claims were viable given this Court's ruling in *Rivers* that claims added in the 1991 Act were not retroactive. In any event, Defendant's argument that the plain language of the Act should be disregarded because of *possible* confusion clearly contravenes established rules of statutory construction.

Under Defendant's strained interpretation, Section 1658(a) would be triggered "only when" Congress creates an "entirely new claim" that does not depend at all on a preexisting statute. (Resp. Br. 2, 14, 35.) While the Defendant spurs wildly unrealistic hypotheticals, it fails to identify even one statute creating a private right of action that would benefit from Congress's enactment of Section 1658(a) if the Defendant's interpretation were to be adopted. Plaintiffs challenged Defendant to find a statute that created a private right of action enacted after December 1, 1990, that did not have its own statute of limitations and which did not in any way have "roots in" or "otherwise reference" prior laws. (Pet. Br. 27) Defendants' brief was notably silent on this issue.

Because Defendant could not find any real examples of confusion that would be created by Plaintiffs' reading of the statute, Defendant attempts to create confusion by wildly suggesting that *every* statute amended by Congress will result in litigation over the proper statute of limitations. (Resp. Br. 2, 11, 28) That argument ignores the very language of Section 1658(a), which states "except as otherwise provided by law." If Congress does not want a new act, which may or may not have roots in a previous statute, to benefit from the "catch all" statute of limitations in Section 1658(a), it can and will provide a statute of limitations for the new cause of action. That is precisely what Congress did when it amended the Securities and Exchange Act of 1934, 15 U.S.C. 78(a) et. seq., and provided a different statute of limitations under the Sarbanes/Oxley amendment, 28 U.S.C. 1658(b), and similarly when Congress created a stand-alone cause of action, in the Family Medical Leave Act of 1993, 29 U.S.C. 2617(c). Certainly Congress's understanding of Section 1658(b) was that if they did not provide the amended Securities and Exchange Act with its own statute of

limitations, it would have been subject to the four-year statute under Section 1658(a), as would have the Family and Medical Leave Act.

It is difficult to believe that the Congress that enacted Section 1658(a) had such a limited and, indeed, practically worthless role in mind for that Section. And, more to the point, there is no reason to believe that Congress would have used the traditionally inclusive concept of "arising under" to characterize the scope of Section 1658(a) if it had such a limited role in mind for this statute.

IV. THE FACT THAT LOWER COURTS HAVE DISAGREED ON HOW TO INTERPRET SECTION 1658(a) DOES NOT MAKE THE STATUTE AMBIGUOUS

Defendant makes the circular argument that Section 1658(a) must be ambiguous because there has been confusion in the lower courts as to how to interpret the statute[7]. (Resp. Br. 16 & n.5) A split in the circuits on an issue of statutory interpretation does not necessarily signify that the underlying statute is ambiguous. *See, Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2153 (2003) ("Our precedents make clear that the starting point for our analysis is the statutory text...[a]nd where, as here, the words of the statute are unambiguous, the judicial inquiry is complete.") (citations and internal quotation marks omitted).

[7] In making this argument Defendant attempts to list the various appellate decisions that have ruled on this question, but neglected to mention the recent Sixth Circuit opinion in *Anthony v. BTR Automotive*, 339 F.3d 506 (6th Cir. 2003) in which the Sixth Circuit found that Section 1658(a) applied to claims under 1981(b).

This Court routinely decides the question of whether a statute is ambiguous and those decisions typically follow numerous and contradictory findings by the lower courts. The fact that lower courts have construed statutes differently than this Court does not render a statute ambiguous. Indeed even the *Patterson* case, in which this Court found "by its plain terms" that the relevant provision in Section 1981 did not ever cover the claims that the Plaintiffs make here, followed decades of contradictory lower court decisions regarding the reach of Section 1981. 491 U.S. at 176-77. Although the definition of Section 1981 became "plain" upon this Court's pronouncement of the statute's meaning in *Patterson*, it was anything but "plain" prior to that holding.

Other examples of statutes that only became "unambiguous" after this Court so held, include: the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-2(a)(1), 2000e-3(a), and 2000e-2(m), in *Oncale v. Sundowner Offshore*, 523 U.S. 75, 118 S.Ct. 998 (1998), *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843 (1997); the Voting Rights Act, 42 U.S.C. § 1973c, § 5, in *Presley, etc., v. Towah County Commission et al.*, 502 U.S. 491, 112 S. Ct. 820 (1992); Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12131 *et. seq.*, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952 (1998); the Federal Arbitration Act, 9 U.S.C. § 1, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302 (2001); and the Fair Labor Standards Act, 29 U.S.C. § 255(a), in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677 (1988).

V. DEFENDANT'S ASSERTED CONCERNS ABOUT THE INTERESTS OF STATE ACTORS AND STATE SOVEREIGNTY ARE NOT ONLY BRAND NEW BUT ENTIRELY MISPLACED

Defendant inappropriately adds a new argument in its response brief claiming that Plaintiffs' interpretation of Section 1658(a) would result in waiving States' immunity from suit under Section 1981[8] and could be read to apply the statute of limitations to state claims against nonconsenting states.[9] (Resp. Br. 30-31) As there are no state actors or state

[8] Defendant's brief states (Resp. Br. 30), without citation to any authority, that "Congress has waived States' immunity to suit under § 1981." This is wrong. To abrogate the States' immunity from suit in federal court, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "[E]vidence of Congressional intent must be both unequivocal and textual." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989). Indeed, as the Court noted in *Jett* v. *Dallas Independent School Dist.*, 491 U.S. 701, 731-732 (1989), Section 1981 contains no express cause of action at all. The Court has inferred a cause of action against private entities for violation of Section 1981. *Ibid.* But the Court held in *Jett* that Section 1981 may be enforced against state actors only through the remedial provisions of 42 U.S.C. 1983. *Id.* at 731-736.

[9] Defendant's (Resp. Br. 30-31) and the amici States' (Br. 3, 10-12) reliance on the principle of *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002), is equally misplaced. The question in *Raygor* was whether the federal supplemental jurisdiction statute could be read to toll the statute of limitations on State claims against nonconsenting States. This case does not involve a State, so of course no state sovereignty issue is presented. More fundamentally, the legislative history of Section 1658(a) makes clear (136 Cong. Rec. §17570-02, 17581 (October

sovereignty issues in this case, these new arguments are entirely misplaced and, in any event, are without merit. See *Jinks v. Richland County S.C.,* 123 S.Ct. 1667, 1673 (2003) (distinguishing *Raygor* in considering claim of party that was "not state").

VI. CONCLUSION

For the reasons stated herein, and in Plaintiffs' Brief on the Merits, and for such other reasons as this Court deems just and appropriate, Plaintiffs ask this Court to find that the four-year statute of limitations set forth in 28 U.S.C. Section 1658(a) applies to all civil actions arising under Acts of Congress enacted by Congress after December 1, 1990, (unless otherwise provided by law) whether or not those civil actions are based on amended laws or laws that have roots in or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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27, 1990)) that the statute only applies to federal claims, therefore the "*Raygor* issue" will never arise in applying Section 1658(a).